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DIVISION II

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STATE OF WASHINGTON

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No. 48987-2-II

**COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

**TODD T. HARDIN,
Respondent,**

v.

**KAREN E. LOFGREN,
Appellant.**

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | |
|--|----|
| TABLE OF AUTHORITIES..... | ii |
| I. STATEMENT OF THE CASE | 1 |
| II. ARGUMENT | 7 |
| A. STANDARDS OF REVIEW | 7 |
| B. THE TRIAL COURT PROPERLY RESTRICTED KAREN'S CONTACT WITH THE CHILDREN PER RCW 26.09.191..... | 8 |
| C. THE TRIAL COURT PROPERLY REQUIRED KAREN TO CARRY THE BURDEN OF PROOF AND CORRECTLY LIMITED THE SCOPE OF THE PROCEEDING TO ONLY THE PROVISIONS OF RESIDENTIAL TIME..... | 13 |
| Burden of Proof..... | 16 |
| Scope..... | 18 |
| D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ANALYZING RCW 26.09.187 | 22 |
| E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING KAREN'S MOTION TO CONTINUE THE TRIAL DATE..... | 25 |
| F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REAPPOINTING GUARDIAN AD LITEM FRANCES KEVETTER..... | 28 |
| G. THE TRIAL COURT DID NOT ERR BY DIRECTING TODD TO FACILITATE FUTURE CONTACT BETWEEN KAREN AND THE CHILDREN | 31 |
| H. THE TRIAL COURT DID NOT ERR BY REQUIRING KAREN TO PAY ATTORNEY FEES AND THE FEES INCURRED BY THE GUARDIAN AD LITEM..... | 32 |
| I. TODD SHOULD BE AWARDED HIS FEES ON APPEAL..... | 34 |
| III. CONCLUSION..... | 35 |

TABLE OF AUTHORITIES

CASES

| | |
|--|--------|
| <i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 159 Wn.App. 35, 244 P.3d 32 (2010), aff'd, 174 Wn.2d 851, 281 P.3d 289 (2012)..... | 23 |
| <i>Chapman v. Perera</i> , 41 Wn. App. 444, 704 P.2d 1224 (1985)..... | 34 |
| <i>Cnty. Ass'n Underwriters of America, Inc. v. Kalles</i> , 164 Wn.App. 30, 259 P.3d 1154 (2011)..... | 32 |
| <i>Corbray v. Stevenson</i> , 98 Wn.2d 410, 656 P.2d 473 (1982)..... | 18 |
| <i>Ferree v. Doric Co.</i> , 62 Wn.2d 561, 383 P.2d 900 (1963)..... | 7 |
| <i>Fluke Capital & Mgmt. Servs. v. Richmond</i> , 106 Wn.2d 614, 724 P.2d 356 (1986).. | 7, 33 |
| <i>George v. Helliard</i> , 62 Wash.App. 378, 814 P.2d 238 (1991)..... | 16 |
| <i>In re the Disciplinary Proceeding Against Petersen</i> , 180 Wn.2d 768, 329 P.3d 853 (2014)..... | 20 |
| <i>In re Guardianship of Stamm</i> , 121 Wn.App. 830, 841, 91 P.3d 126 (2004)..... | 31 |
| <i>In re Marriage of Chandola</i> , 180 Wn.2d 632, 636, 327 P.3d 644 (2014)..... | 11, 25 |
| <i>In re Marriage of Burrill</i> , 113 Wn.App. 863, 872, 56 P.3d 993 (2002)..... | 11, 25 |
| <i>In re the Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997)..... | 7, 8 |
| <i>In re Marriage of McDole</i> , 122 Wn.2d 604, 859 P.2d 1239 (1993)..... | 7 |
| <i>In re Marriage of Spreen</i> , 107 Wn.App. 341, 28 P.3d 769 (2001)..... | 7 |
| <i>In re Parentage of Jannot</i> , 149 Wn.2d 123, 65 P.3d 664 (2003)..... | 19 |
| <i>In re Parentage of Schroeder</i> , 106 Wn.App. 343, 22 P.3d 1280 (2001)..... | 16, 31 |
| <i>In re Parentage of Smith-Bartlett</i> , 95 Wn. App. 633, 976 P.2d 173 (1999)..... | 31 |
| <i>In re Rankin</i> , 76 Wn.2d 533, 458 P.2d 176 (1969)..... | 15 |
| <i>Marriage of Swanson</i> , 88 Wn.App. 128, 944 P.2d 6 (1997)..... | 30 |
| <i>Martinez v. Kitsap Public Servs.</i> , 94 Wn.App. 935, 974 P.2d 1261 (1999)..... | 18 |
| <i>Martonik v. Durkan</i> , 23 Wn.App. 47, 596 P.2d 1054 (1979), review denied, 93 Wn.2d 1008 (1980)..... | 25 |
| <i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010)..... | 8 |
| <i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971)..... | 26 |
| <i>State v. Jackson</i> , 102 Wn.2d 689, 689 P.2d 76 (1984)..... | 22 |
| <i>Troxel v. Granville</i> , 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)..... | 8, 10 |

STATUTES

| | |
|--------------------|----------------------------------|
| RCW 13.34.180..... | 23 |
| RCW 26.09.002..... | 8, 9, 11, 12, 17 |
| RCW 26.09.140..... | 34 |
| RCW 26.09.150..... | 33 |
| RCW 26.09.187..... | 15, 22 |
| RCW 26.09.191..... | 6, 9, 10, 12, 13, 17, 21, 23, 24 |
| RCW 26.09.260..... | 6, 13, 16, 22 |
| RCW 26.09.270..... | 18-19 |
| RCW 26.12.175..... | 33 |
| RCW 26.12.177..... | 28, 29 |

OTHER AUTHORITIES

| | |
|----------------------------------|-------|
| 14 TH AMENDMENT | 8, 13 |
|----------------------------------|-------|

RULES

| | |
|---------------|--------|
| CR 55..... | 14 |
| GALR 2..... | 21, 30 |
| RAP 2.5..... | 24, 31 |
| RAP 18.9..... | 34 |

I. STATEMENT OF THE CASE

The trial court's denial of the Appellant's petition to modify the final parenting plan as to allow her to have contact with her children while she is incarcerated underlies this appeal. CP 271-272, 37-41.

BACKGROUND

The Appellant is Karen Lofgren. The Respondent is Todd Hardin. Karen and Todd¹ filed for divorce in September 2010 and the court entered a decree of dissolution on April 24, 2013. CP 27-36, 317.

The parties had a contentious dissolution proceeding with numerous serious allegations made against both parties. CP 288-313. The court appointed Guardian ad Litem Frances Kevetter to investigate the parenting issues and report to the court. CP 288-313. Ms. Kevetter issued a 26 page report on February 3, 2012 detailing the result of her investigation at that time. CP 288-313.

During the course of the dissolution proceedings Karen solicited the use of a hitman in an attempt to murder her husband Todd. 01/11/16 VRP 45-46, 57-59. On Christmas Eve 2012 Karen gave the "word" to set the plot in motion to have Todd murdered. VRP

¹ For ease of reading the parties are referred to by their first names. No disrespect is intended to either party.

58. In February 2012 Karen unknowingly met with an undercover detective and ultimately was arrested for her involvement in the solicitation for murder plot. 01/11/16 VRP 46-47.

On December 7, 2012 Karen pled guilty to solicitation to commit murder. CP 14. On January 25, 2013 Karen was sentenced in the criminal proceeding and the court imposed the maximum sentence on her as well as entering lifetime no contact orders between her and her husband and their two young children. 01/11/16 VRP 48, CP 8-11.

On April 24, 2013 Karen and Todd entered into an agreed final parenting plan. CP 1-7, 01/11/16 VRP 48-49. Both parties were represented by counsel at the time of entry of the final agreed parenting plan. CP 7. The final agreed parenting plan provided Karen with no contact with the children. CP 4. The final agreed parenting plan further provided that:

“ONLY the provisions regarding the respondent/mother’s contact with the children may be reviewed if the provisions of the no contact orders regarding the children entered under cause no 12-1-00662-0 on 1/25/2013 are terminated.” CP 4.

In addition to language above, the parties agreed to the entry of RCW 26.09.191 findings against Karen for a history of domestic violence and abusive use of conflict. CP 2.

The criminal no contact orders between Karen and the minor children were ultimately vacated by the court in September 2014. CP 59. Karen waited until December 15, 2014 to file a petition for *modification of custody requesting a minor modification based upon the no contact orders being vacated.* CP 37.

On January 15, 2015 Pro Tem Commissioner Kevin Boyle granted Karen's motion for adequate cause. CP 83. Todd timely sought revision of the order granting adequate cause. CP 84-86. The trial court revised the *commissioner's ruling only in manner of* clarifying that the order to grant a minor modification as to determine what, if any, contact there should be between Karen and the children. CP 89-91. The trial judge clarified that Karen would have the burden of proof "as to whether or not contact is in the children's best interest." CP 90. Lastly, the trial court found that there remains a "...grave risk of psychological harm to children from Ms. Lofgren" and re-appointed the original Guardian ad Litem, Frances Kevetter, due to her familiarity with "both the file and the children." CP 90.

Karen sought reconsideration of the court's order. CP 92. In particular, Karen sought review of the order placing the burden of proof on her, limiting the modification to determine only what contact she should have with the children, appointment of Ms. Kevetter as Guardian ad Litem, and allocation of fees for the Guardian ad Litem. CP 136. Karen's motion for reconsideration was denied by the court. CP 118. Karen sought discretionary review from the Court of Appeals of the court's ruling; however, the Court of Appeals denied discretionary review and the matter proceeded to trial. CP 132-142.

On January 8, 2016 Karen brought a motion before the court to continue the trial date due to the unavailability of her expert witness, Sonja Ulrich. CP 182-184. The court denied Karen's motion to continue the trial date and obtain a new expert, in part due to there being no extraordinary circumstances in the record to justify the continuance. CP 195. The court did not preclude Karen's expert from testifying via video deposition, Skype, or another electronic means as to accommodate her unavailability to personally appear at time of trial. CP 197; 01/8/16 VRP 17.

Karen's petition for modification of the 2012 agreed final parenting plan proceeded to trial on January 11-12, 2016. The

Guardian ad Litem testified that she found no evidence that the mother does not pose a "great risk of physical harm to the children." 01/12/16 VRP 195. The Guardian ad Litem recommended that Karen have no contact with the children until such a times as the children have a desire to have contact with her. 01/12/16 VRP 171; Exhibit 3. The Guardian ad Litem further indicated that the children appeared to be thriving with the father and had extremely negative perceptions of Karen due to her actions and abuse inflicted towards Todd and the children. Exhibit 3.

During trial Karen admitted that her actions have harmed the children:

Q: Aren't your children psychologically harmed by you and your desire and plan to kill their father?

A: I have no doubt that my children are psychologically harmed by my actions, yes. 01/11/16 VRP 76

Karen offered no expert witnesses or testimony supporting her contention that contact between her and the children is in the children's best interest from anyone other than herself at time of trial.

During the course of giving the court's oral ruling, the trial court evaluated each of the factors contained in RCW 26.09.187 to

help provide a backdrop. 01/12/16 VRP 248-252. The trial court found that all of the relevant factors favored the father. 01/12/16 VRP 248-252. In conclusion the court opined, "...if I was designing the parenting plan under 187, it would strongly favor the father under these circumstances in any event." 01/12/16 VRP 252.

When evaluating the case under RCW 26.09.260 the trial court first determined that there do exist agreed RCW 26.09.191 factors that were not appealed nor was the court asked to reconsider the factors. 01/12/16 VRP 253, CP 262. The court further found that RCW 26.09.191 subsections (1) through (3) were appropriate given the evidence presented. 01/12/16 VRP 252, CP 275. The trial court determined that due to the limitations and evidence presented that any contact between mother and the children would "come completely out of context for these children at this point" and as such the court denied Karen's petition to modify the parenting plan as to contact between her and the children. 01/12/16 VRP 254, CP 263, 271.

The court further ordered that Karen pay Todd's attorney fees to the extent that the fees were incurred due to Karen's expert

witness who did not testify at time of trial and the fees for the Guardian ad Litem. 01/12/16 VRP 259, CP 271.

Karen timely appealed.

II. ARGUMENT

A. STANDARD OF REVIEW

A court's modification of a parenting plan is reviewed for an abuse of discretion. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993) (a trial court's decision will not be reversed on appeal unless the court exercised its discretion in an untenable or manifestly unreasonable way). Similarly, a trial court's decision on the provisions of a parenting plan are also reviewed for an abuse of discretion. *In re the Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). The trial court's findings of fact are treated as verities on appeal, so long as they are supported by substantial evidence. *Ferree v. Doric Co.*, 62 Wn.2d 561, 568, 383 P.2d 900 (1963).

An award of attorney fees under a statute or contract is a matter of trial court discretion, which will not be disturbed absent a clear showing of an abuse of that discretion. *Fluke Capital & Mgmt. Servs. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986). An award of attorney fees will be reversed only if the decision is

untenable or manifestly unreasonable. *In re Marriage of Spreen*, 107 Wn.App. 341, 351, 28 P.3d 769 (2001).

A trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds or reasons, when no reasonable person would have taken the view adopted by the trial court, or when the trial court applied the wrong legal standard or relied on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010); *In re Marriage of Littlefield*, at 46-47.

B. THE TRIAL COURT PROPERLY APPLIED RCW 26.09.191 TO RESTRICT KAREN'S CONTACT WITH HER CHILDREN.

Karen appears to argue that the trial court violated her constitutional parental rights as set forth in *Troxel* and the 14th amendment. Br. of Appellant at 21; See, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). However, Karen's application of *Troxel*, the 14th amendment, and citations to predominately dependency cases is misplaced.

RCW 26.09.002 provides in part:

In any proceeding between parents under this chapter, the best interests of the child

shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. RCW 26.09.002 (emphasis added).

In the present case the parties stipulated to agreed RCW 26.09.191(1), (2), and (3) findings in the 2013 agreed final parenting plan. CP 2. During the modification proceeding the trial court re-affirmed the findings and emphasized the appropriateness of a RCW 26.09.191(3) finding. 01/12/16 VRP 253, CP 275.

Karen testified during trial that, "I have no doubt that my children are psychologically harmed by my actions, yes." 01/11/16 VRP 76. Karen did not present any evidence to show that her actions no longer pose a significant threat of psychological harm to her children. The court specifically found, "There was quite clearly abusive use of conflict which created a great danger of serious damage to the children's psychological development; that their father had of been killed, my gosh, imagine where they would be today..." 01/12/16 VRP 253. The evidence presented clearly supports the

agreed RCW 26.09.191(1), (2), and (3) limitations entered in the 2013 parenting plan.

RCW 26.09.191 provides in part:

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

...

(d) The absence or substantial impairment of emotional ties between the parent and the child;

...

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development.

RCW 26.09.191(3) (emphasis added)

The Appellant fails to provide any argument indicating how the application of RCW 26.09.191 infringes upon Karen's constitutional rights or is otherwise inconsistent with other statutes. RCW 26.09.191 specifically provides the trial court with authority to limit or preclude any portions of the parenting plan, including contact, if it is in the best interest of the children. Appellant's reading of *Troxel* and application of other unrelated statutes would result in RCW 26.09.191 being completely meaningless and depriving the court of any mechanism to protect the best interest of the children. The

Appellant incorrectly compares this matter, a determination of residential placement between two legal parents, to numerous cases dealing with dependency matters.

The Appellant further argues that restrictions on a parent must be based upon particularized evidence of “relatively severe physical, mental, or emotional harm to a child. Br. of Appellant at 23; *In re Marriage of Chandola*, 180 Wn.2d 632, 636, 327 P.3d 644 (2014). The evidence in the record clearly demonstrates the Karen poses a harm to the children. Furthermore, “While the court ‘need not wait for actual harm to accrue before imposing restrictions,’ it may impose restrictions only where substantial evidence shows ‘that a danger of ... damage exists.’” *In re Marriage of Burrill*, 113 Wn.App. 863, 872, 56 P.3d 993 (2002). *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014). In the present case Karen admits her actions have harmed the children and the continued danger of harm exists. Karen has not presented any evidence to show that the danger no longer exists. Karen presented no evidence of treatment or other steps to mitigate harm. Karen’s reliance on RCW 26.09.002 is misplaced as the statute provides, “...that the relationship between the child and each parent should be fostered unless inconsistent with the child's best

interests.” RCW 26.09.002. In the present case Karen’s contact with the children is inconsistent with the children’s best interest.

In the present case substantial evidence supports the RCW 26.09.191 restrictions. The Appellant completely ignores the fact that the original 2013 final parenting plan contained agreed RCW 26.09.191 restrictions. CP 2. Karen repeatedly argues that the 2013 parenting plan was founded on an “unlawful order.” Br. of Appellant 23. However, Karen points to no evidence in the record to support this argument. The 2013 final parenting plan specifically contemplated the removal of the no-contact order and provided Karen a mechanism to review the final order parenting plan as it related to her contact with the children without any showing of a substantial change in circumstance other than the no contact order being vacated. Karen opted to forgo her right to proceed to trial in 2013 and instead voluntarily entered into an agreed parenting plan that specifically contemplated the removal of the No Contact order.

Even ignoring the plain language of the parenting plan, Karen put forth no evidence to demonstrate that a substantial change of circumstance related to the basis for the limitations occurred since the entry of the 2013 parenting plan. RCW 26.09.260. Karen did not

produce a single treatment record or any other evidence demonstrating that a basis exists to modify the RCW 26.09.191 findings. Karen fails to show that the trial court violated her 14th amendment right when the trial court properly restricted her contact under RCW 26.09.191 and she has presented no evidence or analysis to support an argument that the statute as written is unconstitutional.

C. THE TRIAL COURT PROPERLY APPLIED RCW 26.09.260 TO REQUIRE THAT KAREN CARRY THE BURDEN OF PROOF AND PROPERLY LIMITED THE PROCEEDING TO ADDRESS ONLY WHAT CONTACT BETWEEN KAREN AND THE CHILDREN IS APPROPRIATE.

Karen again argues that the trial court did not properly adjudicate the parenting issues by limiting the scope of the 2016 trial to a determination of what, if any, contact is appropriate between Karen and the children. Br. of Appellant 24. Again, Karen minimizes the existence of both the 2013 agreed parenting plan and statutory law. The 2013 agreed final parenting plan specifically provided that:

1. The respondent/mother was convicted of solicitation to commit murder of the petitioner/father, second degree, on January 25, 2013, under Pierce County cause no. 12-1-00662-0, was sentenced to 165 months in prison, and was ordered to have no contact with the petitioner/father and the minor children. A copy of the judgment and Sentence and

the No Contact Orders regarding the children are attached hereto.

2. ONLY the provisions regarding the respondent/mother's contact with the children may be reviewed if the provisions of the no contact orders regarding the children entered under cause no 12-1-00662-0 on 1/25/2013 are terminated. CP 4.

Karen does not provide any evidence that she did not knowingly enter into an agreement for final orders containing this language. Karen never moved to vacate or appeal these final orders. The plain language of the 2013 parenting plan clearly contemplates the possible vacation of the No Contact orders and provides Karen an avenue to review the residential time provision should the orders be vacated. Karen now appears to urge the court to hold that agreed orders should not be honored and should be set aside due to the lack of a full trial on the merits. Such logic completely undermines the legal process as it would result in no finality of actions and force all matters into a full trial in order to obtain finality. The Respondent is unaware of any case law to support Karen's position.

Karen further urges the court to treat this matter like a CR 55 motion and compares the present case to that of a directed verdict in a civil action based upon a criminal conviction. Br. of Appellant 25.

The Appellant's argument that the 2013 final parenting plan was based off the vacated No Contact orders is wholly without merit. As discussed above, the 2013 parenting plan specifically contemplated that the No Contact orders may be vacated. The 2013 parenting plan did not automatically provide Karen with any visitation should the No Contact orders be vacated. Karen agreed at the time of entry of the 2013 parenting plan that the only portion of the parenting plan that would be reviewed if the No Contact orders were vacated was her contact with the children. CP 4. The 2013 parenting plan was not based on the No Contact orders.

The Appellant further argues that in the present case modification is permitted without a change in circumstances. Br. of Appellant 25. The Appellant relies heavily on *Rankin* to support their position. *In re Rankin*, 76 Wn.2d 533, 458 P.2d 176 (1969). The Appellant's reliance on this case is heavily misplaced. *Rankin* deals with a situation where a default judgment was entered against a party. This is unlike the present case where both parties were represented by counsel and knowingly decided to enter into agreed orders instead of proceeding to a full trial on the merits. Even if *Rankin* were to apply to the present situation, the trial court in this

matter went through the RCW 26.09.187 factors and determined that virtually all factors favored the father. 01/12/16 VRP 248-252. This case is not akin to a default judgment.

BURDEN OF PROOF

Karen argues that the trial court improperly placed the burden of proof on her “as to whether contact is in the children’s best interest.” CP 122; Br. of Appellant 26. This court previously stated in this matter:

“Washington law contains a strong presumption in favor of custodial continuity based on the understanding that abrupt change is detrimental to a child’s best interest; therefore, modification of the parenting plan is not encouraged by the court or the Legislature. CP 135.

It is settled law that it is the moving party's burden to prove a modification of a parenting plan is appropriate. *In re Parentage of Schroeder*, 106 Wn.App. 343, 22 P.3d 1280 (2001); See also *George v. Helliar*, 62 Wn.App. 378, 383-84, 814 P.2d 238 (1991). This is in line with a plain reading of the RCW 26.09.260 which provides in part:

A parent with whom the child does not reside a majority of the time and whose residential time with the child is subject to limitations pursuant to RCW 26.09.191

(2) or (3) may not seek expansion of residential time under subsection (5)(c) of this section **unless that parent demonstrates** a substantial change in circumstances specifically related to the basis for the limitation.

The court properly placed the burden of proof on Lofgren.

In the present case the parties entered into an agreed final parenting plan that provided Karen with no contact with the children regardless of whether or not the No Contact Order was ever vacated.

CP 1-7. RCW 26.09.002 provides in part:

The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. RCW 26.09.002 (emphasis added).

The court previously determined through the entry of an agreed final parenting plan that it was not in the children's best interest for Karen to have contact with them and implemented the agreed RCW 26.09.191 restrictions. CP 2. The presumption of parental contact set forth in RCW 26.09.002 no longer applies in this case due to the findings and limitations set forth in the 2013 agreed final parenting

plan. Substantial evidence shows that Todd rebutted any presumption in favor of contact between Karen and the children.

Final judgments entered by stipulation or consent are contractual in nature. *Martinez v. Kitsap Public Servs.*, 94 Wn.App. 935, 942, 974 P.2d 1261 (1999). "Words in a contract should be given their ordinary meaning." *Id.* at 944 (citing *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982)). Karen had the opportunity to advance the original dissolution proceeding to trial on the merits but decided to enter into an agreement. Karen carries the burden of proof to change these findings and show that contact between her and the children is now appropriate. The court did not err in determining that Karen has the burden of proof as to her petition to modify the final parenting plan. Karen failed to carry the burden of proof.

SCOPE

The Appellant argues that the court erred by limiting the scope of the modification proceeding to "what, if any, contact there should be between mother and children." Br. of Appellant 28; CP 90. The Appellant offers no legal authority to support their position that the court is without discretion to limit the proceedings of a modification to specific issues. RCW 26.09.270 provides in part:

A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his or her motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his or her affidavit, to other parties to the proceedings, who may file opposing affidavits. RCW 26.09.270.

A plain reading of the statute indicates that the moving party must set forth by affidavit specific facts to support their requested modification. In the present case two issues control. First, the parties stipulated in the 2013 parenting plan that any modification resulting from the vacation of the No Contact Order would be limited to a determination of what contact is appropriate. CP 4. The Appellant offers no legal argument or authority that the 2013 parenting plan should not control on this issue. Second, even if the court were to ignore the plain language of the 2013 parenting plan, the Appellant did not set forth a change of circumstance other than vacating the No Contact Order as to establish adequate cause to change any other provisions of the parenting plan. An appellate court may overturn a trial court's RCW 26.09.270 adequate cause determination only if the trial court has abused its discretion. *In re Parentage of Jannot*, 149

Wn.2d 123, 126, 65 P.3d 664 (2003). Based upon the plain language of the agreed 2013 parenting plan and the Appellant's only alleged change of circumstance being the vacation of the No Contact Order the court did not abuse its discretion in limiting the inquiry into only the contact between mother and the children. CP 40.

The Appellant argues that the trial court failed to act impartiality by indicating at the time the court heard Karen's motion for revision that "there may be a grave risk of psychological harm to children from Ms. Lofgren." CP 90; Br. of Appellant 29. A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *In re the Disciplinary Proceeding Against Petersen*, 180 Wn.2d 768, 787, 329 P.3d 853 (2014). In the present case there is no evidence to show that the trial judge hearing the trial (who was a different judge from the judge who signed the order on revision) had any bias in this action. Furthermore, the trial court did not make a finding that actual psychological harm existed at time of the motion for revision but rather that there "may be" a risk of harm. CP 90. This is akin to a trial court issuing a Guardian ad Litem scope order directing that the

Guardian ad Litem investigate certain issue for one, or both, parents. See GALR 2(j). In the present case, the court clearly wished to have the Guardian ad Litem investigate the possibility of psychological harm that may be inflicted by Karen having contact with the children. Karen has not put forth any argument or legal authority to support her argument that the trial court cannot provide direction to a Guardian ad Litem as to what issues need to be investigated. Providing direction to the Guardian ad Litem does not create bias.

The Appellant further argues that the trial court erred in declining to review the RCW 26.09.191 restrictions against Karen. Br. of Appellant 30. For the reasons set forth above, the 2013 agreed final parenting plan is controlling on this issue. The Appellant never alleged in their petition for modification that a substantial change of circumstances occurred to warrant changing the RCW 26.09.191 restrictions. Even should the court ignore the plain language of the 2013 parenting plan, substantial evidence supports the findings. After hearing all evidence the court modified the RCW 26.09.191 findings slightly but specifically found that RCW 26.09.191(3) applied due to Karen's attempt to have the father of her children murdered. CP 275; 01/12/16 VRP 252.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN ANALYZING RCW 26.09.187.

The trial court did not abuse its discretion by analyzing the RCW 26.09.187 factors. The court specifically stated, "...I think it's important to kind of go through this, because these elements are still prevalent or still worth thinking through even in a 260 situation, which is what this is." 01/12/16 VRP 248. The trial court specifically recognized the proceeding as a RCW 26.09.260 and only used RCW 26.09.187 as a backdrop to its analysis. The Appellant provides no legal authority to support its position that it is error for the court to simply work through the RCW 26.09.187 factors in a modification proceeding. If anything, reviewing RCW 26.09.187 is beneficial to the Appellant as the court gives no weight to the existing parenting plan when reviewing such factors. Even if it is error for the court to review the RCW 26.09.187 factors any error is harmless as it is undisputed that the court ultimately applied RCW 26.09.260 and the Appellant has not demonstrated any prejudice caused by reciting the RCW 26.09.187 factors. An error will be considered harmless unless it affects the outcome of the case. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). A harmless error is an error that is trivial, formal,

or merely academic; was not prejudicial to the substantial rights of the party assigning it; and in no way affected the final outcome of the case. *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn.App. 35, 44, 244 P.3d 32 (2010), *aff'd*, 174 Wn.2d 851, 281 P.3d 289 (2012).

The Appellant improperly compares the present proceeding to a dependency and third party custody proceedings. Br. of Appellant 31. Neither is appropriate due to the fact that there is no allegation that both parents are unfit. This is a custody proceeding properly controlled by RCW 26.09 and therefore RCW 13.34.180(1)(e)(3) is not relevant to this matter. In the present case, Karen's absence of contact with the children was directly caused by her own actions.

The Appellant further argues that the application of RCW 26.09.191(3)(d) is improper when a parent is in state custody. Br. of Appellant 31. Again, the appellant must improperly rely on dependency statutes to support this argument. The appellant offers no case law to support this position. Regardless, this is an argument that the appellant improperly raises for the first time on appeal. An appellant cannot raise an alleged error for the first time on appeal

unless it is manifest and affects a constitutional right. RAP 2.5(a),

(a)(3). RAP 2.5(a) provides:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:

(1) lack of trial court jurisdiction,

(2) failure to establish facts upon which relief can be granted, and

(3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

The Appellant's argument was not raised at the trial court level and as such is not properly before this court.

After properly determining that RCW 26.09.191 factors apply, the trial court correctly limited Karen's contact with the children. CP 275, 277-278. Specifically, the court found that Karen's actions have had a profound impact on the psychological development of the

children and that further contact by her may cause damage to the children. 01/12/16 VRP 253-255. Karen appears to argue that the court needs to find actual harm to the children in order to limit contact. Br. of Appellant 34. This argument is contrary to Washington law as the court only needs to find a potential for harm. "While the court 'need not wait for actual harm to accrue before imposing restrictions,' it may impose restrictions only where substantial evidence shows 'that a danger of ... damage exists.'" *In re Marriage of Burrill*, 113 Wn.App. 863, 872, 56 P.3d 993 (2002). *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014). Here the court found that Karen's contact with the children posed a significant risk of psychological harm to the children and as such properly limited her contact.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING KAREN'S MOTION TO CONTINUE THE TRIAL DATE.

A trial court's decision granting or denying a motion for continuance is reviewed for a manifest abuse of discretion. *Martonik v. Durkan*, 23 Wn.App. 47, 50, 596 P.2d 1054 (1979), review denied, 93 Wn.2d 1008 (1980). A manifest abuse of discretion occurs where the trial court's ruling is manifestly unreasonable or is based on

untenable grounds or done for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Karen mischaracterizes the trial court's ruling as denying her motion for a continuance of the trial and depriving her of an expert witness. Br. of Appellant 35. This is not what trial court ruled. The trial court denied Karen's motion for continuance but ruled: "Ms. Ulrich may testify via video / skype or in person." CP 197. The trial court further left open the possibility of accommodating the testimony at a time other than at trial:

When I looked at this this last week, one thought came to mind is start the trial on Monday, and when we can get the video dep or video presentation, Skype, whatever you want to do with your expert, we'll put that in to the trial. But wouldn't be more than a couple weeks out after we start trial. 01/08/16 VRP 17.

The trial court did not deprive Karen of her witness but rather gave Karen every opportunity to have her witness testify at time of trial. However, for unknown reasons, Karen made the decision to not use Ms. Ulrich at time of trial even though she was authorized to testify via electronic methods even at times outside of the actual day of trial.

The trial court did not abuse its discretion in denying Karen's motion to continue. Karen's motion to continue is based solely on her

perceived unavailability of her expert. CP 182-187. As the trial court noted:

THE COURT: I'm confused why there isn't any clarity here why she couldn't testify, if not at least by Skype or something. Why can't she testify.

MS. HUMPHRIES: Well, the issue from my client --- I'm not representing Ms. Ulrich. But the issue from my client's perspective is that Ms. Ulrich is refusing to testify.

THE COURT: Did you subpoena her?

MS. HUMPHRIES: No. 01/08/16 VRP 7-8.

Karen made a tactical choice to not subpoena her expert witness to trial and now argues that it is error for the court to deny her request to continue the trial date based upon her own actions. Furthermore, Karen decided to not present any evidence or basis that her expert would be unavailable to testify electronically. Obviously, had such evidence existed the court did not preclude Karen from renewing her motion.

In addition to balancing the interests of the litigants, the court considered the best interest of the children in the circumstances. The court opined, "It's certainly not doing the best thing for the children to have this thing linger on." 01/08/16 VRP 17. This is in line with the

Guardian ad Litem's testimony, "these children need a trial. They need this to be done. This is upsetting. It's traumatizing." 01/08/16 VRP 12. The court upheld its duty under the court rules and statute by denying Karen a continuance in this matter.

F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY RE-APPOINTING GUARDIAN AD LITEM FRANCES KEVETTER.

The court originally appointed Guardian ad Litem Frances Kevetter on August 26, 2011. CP 289. Ms. Kevetter was extensively involved with the dissolution proceeds and filed a 26-page preliminary report on February 2, 2012, which was again updated in June 2012. CP 289-313; Ex. 1. There is no dispute that Ms. Kevetter was properly appointed in August 26, 2011.

Lofgren appears to read RCW 26.12.177 as prohibiting the court from reappointing a Guardian ad Litem to a matter where they have already served and requiring a new strike list to be generated. Br. of Appellant 40. RCW 26.12.177 provides in part, "Guardians ad litem under this title shall be selected from the registry except in exceptional circumstances as determined and documented by the court." A plain reading of RCW 26.12.177 clearly states that the

Guardian ad Litem must be selected from the registry. There is no argument, or evidence, that Ms. Kevetter is not in the court registry and was not selected from it. Lofgren appears to really be arguing that a new strike list should have been generated; however, she offers no legal authority for such a position. RCW 26.12.177 does not place a prohibition on the court reappointing a previous Guardian ad Litem back to the same case in order to conserve judicial resources.

Even if the statute were applicable, exceptional circumstances exist for the court to reappoint Ms. Kevetter. As the court stated:

“It doesn’t make any sense to have someone else go through this tortured history in both the family law proceeding and the criminal proceeding just to get up to speed as to what occurred. Ms. Kevetter is aware of what the allegations were. She’s aware of the kids’ emotional condition at the time of the arrest. CP 112.

Ms. Kevetter’s familiarity with the matter serves the best interest of the children by timely and succinctly moving the matter forward without wasting resources.

Karen failed to preserve any alleged error that the Guardian ad Litem failed to adequately perform her duties. Karen never brought any motion to remove Ms. Kevetter from her appointment and as such

she assigns error to Ms. Kevetter's appointment for the first time on appeal. Karen's assignment of error is barred by RAP 2.5.

At time of trial Karen had the opportunity to examine Ms. Kevetter regarding her work and recommendations, including criticizing her work. 01/12/16 VRP 168-207. Ms. Kevetter's report is not binding on the court.

The trial court receives the guardian's report and recommendation, and considers the other parties' comments and criticisms. Then, it "balance[s] the interests of all parties involved, while keeping in mind that the child's interests are paramount." It "is not bound" by the guardian's report or recommendation, but instead must make its own assessment of the child's best interests. *Marriage of Swanson*, 88 Wn.App. 128, 944 P.2d 6 (1997).

The trial court in the present matter evaluated all evidence in front of it, including any criticism of Ms. Kevetter's work, and used the court's discretion to determine what weight to place on the report. 01/12/16 VRP 253. The court did not err in reappointing Ms. Kevetter.

Lofgren further argues that Ms. Kevetter did not perform her duties in accordance with GALR 2. This is an issue raised by Karen for the first time on appeal and as such is not properly before the court.

RAP 2.5. If Karen had concerns regarding the investigation of the Guardian ad Litem those concerns should have been raised to trial judge during the course of the proceedings. In addition, "Judges understand that the GAL presents one source of information among many, that credibility is the province of the judge, and can without difficulty separate and differentiate the evidence they hear." *In re Guardianship of Stamm*, 121 Wn.App. 830, 841, 91 P.3d 126 (2004). In the present case additional evidence existed to support all of the trial court's findings independent of the recommendations of the Guardian ad Litem.

G. THE TRIAL COURT DID NOT ERR BY AUTHORIZING TODD TO FACILITATE CONTACT BETWEEN THE CHILDREN AND KAREN WHEN THE CHILDREN ARE READY FOR SUCH CONTACT.

The trial court did not err by providing that the father would be responsible for facilitating contact between mother and the minor children. Karen cites *In re Parentage of Schroaeder* and *In re Parentage of Smith-Bartlett* to support her argument that the court improperly delegated authority. *In re parentage of Schroeder*, 106 Wn. App. 343, 11 P.3d 1280 (2001); *In re Parentage of Smith-Bartlett*, 95 Wn. App. 633, 976 P.2d 173 (1999). Neither case is on point to the

issue in the present matter as both cited cases discuss a trial court delegating decision making authority for a modification to a 3rd party.

In the present case the court does not delegate its decision making authority. The trial court outright prohibits Karen from having contact with the children until such a time as the children express a desire to speak with Karen. CP 278. Upon the children expressing the desire to contact Karen, the court charged Todd with facilitating the contact. CP 278. This is not an impermissible delegation of authority as the court specifically set forth how future visitation will occur.

E. THE TRIAL COURT DID NOT ERR BY REQUIRING KAREN TO PAY THE GUARDIAN AD LITEM COSTS AND HARDIN'S ATTORNEY FEES INCURRED AS A RESULT OF KAREN'S EXPERT WITNESS.

Under Washington law, a trial court may only grant attorney fees if the request is based on a statute, a contract, or a recognized ground in equity. *Cnty. Ass'n Underwriters of America, Inc. v. Kalles*, 164 Wn.App. 30, 38, 259 P.3d 1154 (2011). An award of attorney fees under a statute or contract is a matter of trial court discretion, which will not be disturbed absent a clear showing of an abuse of that

discretion. *Fluke Capital & Mgmt. Servs. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986).

RCW 26.09.150 provides in part:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment. RCW 26.09.150.

The court has the authority to award attorney fees in this matter. The court heard testimony regarding the financial resources of Karen, including over \$22,500 paid for legal fees. 01/12/16 VRP 156-160. The court further considered Karen's last minute choice to abandon her expert witness. 01/12/16 VRP 258-259. Todd was forced to incur fees and costs at the result of Karen's expert witness. CP 282. There is no argument that the fees incurred were not reasonable.

Similarly, the court has the authority to award costs for the Guardian ad Litem to either or both parties. RCW 26.12.175. Again, the court heard testimony regarding Karen's financials. The court has

discretion to allocate fees for the Guardian ad Litem considering the relevant financial facts.

G. TODD SHOULD BE AWARDED HIS ATTORNEY FEES INCURRED AS A RESULT OF THIS APPEAL.

This appeal is frivolous.

RCW 26.09.140 provides that

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

RAP 18.9 provides, in pertinent part: "The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who . . . files a frivolous appeal . . . to pay terms . . . to any other party who has been harmed by . . . the failure to comply or to pay sanctions to the court."

"An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985) (citations omitted).

In her brief, Karen urges an erroneous construction of well-settled statutes, Court Rules and case law. She assigns numerous

errors but has raised no issues subject to any debate, because each of the applicable statutes and court rules are clear. No reasonable minds can differ as to their meaning and application. There is no merit to any of the issues raised in her opening brief. Todd should be awarded his reasonable attorney's fees for the necessity of having to respond.

III. CONCLUSION

Judge Johnson was vested with broad discretion in hearing Karen's petition to modify the parenting plan. Karen is essentially seeking to re-litigate the 2013 agreed final parenting plan with no consideration to the children's best interest. Although Karen raises numerous alleged errors, the assignments of error lack any legal foundation and as such this appeal is frivolous.

Judge Johnson's decisions followed all applicable legal standards. His rulings should be affirmed, and Todd should be awarded attorney's fees for having to prepare this response.

DATED this 3rd day of March, 2017.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a cursive 'H' and 'L'.

Andrew Helland, WSBA #43181
Attorney for Todd Hardin

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DIVISION II

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Declaration of Transmittal

STATE OF WASHINGTON

Under penalty of perjury under the laws of the State of WA

DEPUTY

Washington I affirm the following to be true:

On this date I transmitted the original document to the
Washington State Court of Appeals, Division II by the e-filing portal,
and delivered a copy of this document via e-mail to:

Patricia Novotny
Nancy Zaragova
3418 NE 65th St., Suite A
Seattle, WA 98115
Patricia@novotnyappeals.com
Nancy@novotnyappeals.com

Signed at Tacoma, Washington on this 30th day of March,
2017.



Andrew Helland